

PROSECUTION? YOU HIV GOT TO BE KIDDING ME!©

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With the UNAIDS recent announcement of its target to avert 28 million new HIV infections and to ultimately halt the HIV/AIDS epidemic by 2030¹, it is essential that Canada reviews its misused stigmatising laws, which may prevent this goal from being accomplished.

I argue in this paper that there is a need to end prosecutions of non-disclosure in Canada in order to remove the prejudicial stigma of HIV, and to achieve the UNAIDS goal of ending this inexorable epidemic. Canada's misguided use of existing laws require reform to promote both the termination of the stigma associated with HIV and the promotion of education on this topic with the goal of ending this public health issue.

I will attempt to accomplish this in four segments; part one will detail how the failure to be tested for HIV is a serious problem in Canada along with the problems of existing laws being used to prosecute non-disclosure. Part two will detail the dangerous issue of stigma which surrounds HIV. Part three will detail the negative financial and social impacts of incarcerating HIV positive individuals, and finally, part four will discuss possible solutions that can be implemented alongside the end of prosecutions for non-disclosure.

INTRODUCTION TO EXISTING LAWS SURROUNDING NON-DISCLOSURE

The origins of HIV/AIDS spans almost one hundred years previously to the Democratic Republic of Congo; but was first identified as a public health crisis in the 1980s when there was a sudden outbreak of illness among young, gay men who each displayed similar signs of severe immune deficiency. The worldwide rate of

¹ UNAIDS (2014) 'Countries ready to "Fast Track" response to end the final chapter of the AIDS epidemic.'

HIV/AIDS grew at an exponential rate over the next decade with the World Health Organisation estimating over 400,000 cases by 1990.² Over the following twenty years the epidemic spread to over 40 million people across the globe.

The sudden outbreak in the 1980s has transcended throughout the decades and is presently a serious problem in Canada with approximately 75,500 people living with HIV in 2015.³ However, worrying statistics show that an estimated 25% of those people are unaware of their HIV positive status⁴, and therefore without this knowledge they are unable to take steps to prevent the transmission to sexual partners; therefore continuing this cycle of HIV transmission.

After the original decision in *R v Cuerrier*⁵ followed in 2012 by *R v Mabior*⁶, in Canada today it is a criminal offence to fail to disclose your HIV positive status to a sexual partner where there is “*a realistic possibility of transmission of HIV*”⁷; those who do not disclose face criminal sanctions with the most extreme punishment being life imprisonment.

The most remarkable part of these criminal sanctions lies with the Criminal Code which details no crime which explicitly refers to the non-disclosure of HIV or the unlawful transmission of HIV; the Criminal Code is applied with reference to existing crimes, most commonly aggravated sexual assault. It is argued that criminalising non-disclosure in 1998 has failed to adequately decrease the rates of transmission considering that in 1998 there were 2,290 reported cases of HIV and in 2014 there was 2,044 cases⁸; not including unreported cases, or those where individuals are unaware of their positive status.

² "History of HIV and AIDS overview | AVERT", (2016) <http://www.avert.org/professionals/history-hiv-aids/overview#footnote38_yeskiq>.

³ "The epidemiology of HIV in Canada | CATIE - Canada's source for HIV and hepatitis C information", (2016) <<http://www.catie.ca/en/fact-sheets/epidemiology/epidemiology-hiv-canada>>.

⁴ Pearson, Catherine. "Are You Positive? 1 In 5 People with HIV Don't Know Their Status", (2011) <http://www.huffingtonpost.com/2011/06/23/hiv-screening_n_882467.html>.

⁵ *R v Cuerrier* [1998] 2012 SCC 47.

⁶ *R v Mabior* [1998] 2 SCR 371.

⁷ *Ibid.*

⁸ Government of Canada. *HIV and AIDS in Canada: Surveillance Report to December 31, 2014* (Government of Canada, 2014).

STIGMA OF POSITIVE HIV STATUS

There is a serious concern that the criminalisation of non-disclosure has acted not as a deterrent but counterproductively as a mechanism to encourage ignorance. As previously mentioned, there has been no decrease in the transmission rates of HIV since the ruling in *Cuerrier*.⁹

The criminalisation has only resulted in discouraging individuals from getting tested as many fear with this knowledge comes criminal sanction surrounded with public discrimination. Although society requires a punishment for an act we consider to be wrong; we must look for a more appropriate and successful solution to this issue.

Correspondingly, there is a massive stigma that surrounds the diagnosis of HIV. This can be attributed to false stereotypes, the media's portrayal of HIV and the apparent lack of public knowledge surrounding the illness and the effective options and treatments now available.

Stereotypes which stem from the moral panic in the 1980s – when there was little known about the ways in which HIV can be transmitted – include false beliefs that HIV is a disease which affects only males, the LGBT community, intravenous drug users and those who are/were involved in the sex trade. These harmful stereotypes which were proven to be untrue many years ago are affecting HIV positive people in many destructive ways today. They face consequences which are not limited to loss of income, loss of relationships and loss of reputation.¹⁰

Despite the media being a constant and increasingly powerful presence throughout the preceding decades, they have not contributed to correct these inaccurate stigmas and stereotypes. Instead, the media fuelled the prejudice afflicted against

⁹ *Ibid.*

¹⁰ *International Center for Research on Women* (2005) 'HIV-related stigma across contexts: common at its core' - See http://www.avert.org/professionals/hiv-social-issues/stigma-discrimination/#footnote5_gioulhb.

those with HIV; an article that appeared in 'Maclean's'¹¹ in 1983 highlights the wrongly perceived correlation between gay male promiscuity and HIV. To do so, it relied upon largely unsubstantiated claims about the number of sexual partners of gay men who were HIV-positive, falsely stating: "*The vast majority of sufferers—75%—are homosexual males, many of them highly promiscuous, some with sexual histories involving many hundreds, and even thousands of partners.*"

These false reports and damning descriptions of the lifestyles that supposedly applied to all individuals who contracted HIV continued throughout the decades. This suggested that gay men were individually responsible for the disease through their promiscuous lifestyle choices¹², instead of reporting it as the public health epidemic which was affecting all groups of society.

An example is the case of *R v Aziga*¹³ where a man who was diagnosed with HIV subsequently had sex with eleven women; seven of whom contracted HIV and two of whom died as a result of complications relating to AIDS. Aziga was charged with first degree murder despite there being no specific law at the time requiring disclosure to a sexual partner. The headlines that followed only served to highlight the portrayal of those with HIV as contagious, overly sexualised and criminal. The top two headlines when searching Aziga's name online are "*HIV killer ruled dangerous offender*"¹⁴ and "*Johnson Aziga is still looking out for number 1*".¹⁵

Although Aziga is a rare case where an individual intentionally transmitted HIV, the media portrayal made it appear that all individuals with HIV should be feared and that Aziga's actions were common among HIV positive people. From this long-term media depiction, it is argued that HIV positive individuals are being subjected

¹¹ Shona McKay, "The Growing Canadian AIDS Alarm", Maclean's (11 July 1983) 34, cited in Edward Albert, "Illness and Deviance: The Response of the Press to AIDS" in Gross & Woods, note 16, 393 at 396-97.

¹² Kirkup, Kyle. "Releasing Stigma: Police, Journalists and Crimes of HIV Non-Disclosure", (2016) <<https://kylekirkup.files.wordpress.com/2013/01/olr-typeset-1-kirkup-2.pdf>>.

¹³ *R. v. Aziga* [2008] O.J. No. 2431.

¹⁴ Gale, Kimberley. "HIV killer ruled dangerous offender", CBC News (2011) <<http://www.cbc.ca/news/canada/hiv-killer-ruled-dangerous-offender-1.927621>>.

¹⁵ Clairmont, Susan. "Johnson Aziga is still looking out for No. 1", Hamilton Spectator (2011) <<http://www.thespec.com/news-story/2165590-johnson-aziga-is-still-looking-out-for-no-1/>>.

to unfair stereotyping, which may reflect against the public's perception of the presumption of innocence. The stigma and the branding of all HIV positive people altogether as criminals could have serious detrimental effects on an individual's right to a fair and unbiased trial and may be making its way into Canada's judicial institutions.

In an unreported case documented on aidsactionnow.org¹⁶, a committed campaigner Carl Rush experienced, first-hand, the bias that is faced by HIV positive individuals on trial for non-disclosure.¹⁷ Despite the requirement of the prosecution to prove beyond a reasonable doubt that sexual acts took place, that the defendant did not disclose his HIV status and prove a lack of consent knowing of this HIV disclosure; the jury somehow convicted the accused, despite countless contradictions from key prosecution witnesses.

The defence counsel even stated: *"I'm a little shocked...I think the jury got it wrong"*, which poses the question of whether the accused was convicted simply because he was known to be HIV positive? Without any doubt, it seems that the HIV positive status of the defendant acted as a catalyst in the conviction. It is hard to imagine any jury convicting without the proof of the sexual activity required to satisfy the criminal charge. As pointed out by journalist Zach Stafford, this is a man sentenced to a life in prison purely as a result of an infectious disease¹⁸; contracting chickenpox also a contagious disease does not result in a sentence of life imprisonment despite there being life-long treatments for both. Canadian laws are outdated; reflective of the 1980's where contracting HIV was a death sentence; as such the Courts were reflective in their harsh sentencing.

This public stigma resulting from the media's depiction could easily influence a jury's verdict in a case where witnesses rely on the prosecutions presentation

¹⁶ "Action = Life", (2015) <<http://www.aidsactionnow.org/>>.

¹⁷ "A Spectacle of Stigma: A First-hand Account of a Canadian Criminal HIV Exposure Trial - See <http://www.aidsactionnow.org/?p=1057#sthash.otwkUeGG.dpuf>", (2013).

¹⁸ Zach Stafford 'Failure to disclose HIV-positive status is a felony that leads to a much worse crime', (2015) <<https://www.theguardian.com/commentisfree/2015/jul/17/hiv-aids-disclosure-felony-std-tests-la>>.

which often dramatizes and falsely represents the scale of HIV's effects without explaining the advanced medical options available, with injurious results for the accused; an issue that must be investigated urgently to prevent further miscarriages of justice.

SOCIAL AND ECONOMIC IMPACTS OF PROSECUTION

It is hardly surprising that the public fear HIV due to the outdated and lack of clear public health campaigns detailing how HIV is transmitted, how to protect against it and the many successful treatments available. Without this knowledge, the public are still stuck in the mind-set that they had in the 1980s when there was substantially less knowledge and medical advancement for treatments for the disease. In a study conducted in 2012, 61% of Canadians considered themselves to have a low or medium level of knowledge of HIV/AIDS showing a decline in Canadians knowledge since the same study was conducted back in 2006.¹⁹

These factors are resulting in a stigma, which in turn results in a lack of testing, corresponding to higher numbers of individuals who participate in unsafe sex or risky behaviours without awareness of their status; thus, not accessing the appropriate medical treatment. Treatments which when started early enough can allow a HIV positive person to live as long as a HIV negative person.²⁰ This lack of awareness can result in the unintentional transmission of HIV with criminal charges following with individuals then incarcerated in Canadian jails.

Finally, the contention of prosecutions of non-disclosure of HIV lies with the high cost of incarcerating individuals within the prison system. Alongside the financial considerations, there is also a high incidence of 'needle sharing' within the prison system alongside although not frequently reported sexual violence. Both of which are high risk behaviours for the transmission of HIV.

¹⁹ EKOS Research Associates Inc. 2012 HIV/AIDS Attitudinal Tracking Survey. Final Report. (October 2012) See http://epe.lac-bac.gc.ca/100/200/301/pwgsc-tpsgc/por-ef/public_health_agency_canada/2012/072-11/report.pdf.

²⁰ Zach Stafford 'Failure to disclose HIV-positive status is a felony that leads to a much worse crime', (2015) <<https://www.theguardian.com/commentisfree/2015/jul/17/hiv-aids-disclosure-felony-std-tests-law>>.

To give a brief overview: 17% of male prisoners and 14% of female prisoners in Canada admit to using drugs inside prison and 60% of these instances were with used needles.²¹ Initiatives such as the safe tattooing programme were shut down in 2007 by the Public Safety Minister on the grounds of “*not wanting to waste taxpayer’s money*”, despite a report in the same year finding that 68% of inmates admitted to getting a tattoo behind bars.²² The safe needle exchange programme behind bars was also cancelled due to the unwillingness of the Conservative Government to be seen as encouraging drug use behind bars, they feared that the needles would be used as weapons and that the programme would increase drug use.

However, at least ten research projects have proven this fear to be unfounded; there were no new reported security issues with the needles and no increase in drug use; in fact, there was a decrease in injection related diseases and an increased uptake in treatment programmes.²³ This alleged ‘concern’ for taxpayers’ money does not add up, considering that the lifetime cost of treatment for one Canadian who contracts HIV is estimated to be over \$250,000.²⁴ Canadian prisons are already overcrowded and expensive – costing \$114,000 annually per inmate²⁵; by adding unnecessary inmates who may unwillingly transmit HIV to fellow prisoners, causing soaring healthcare expenses is senseless.

Whilst the incidences of sexual violence in Canadian prisons are not at the same extreme level as American counterparts²⁶; it is an essential issue to consider in the discussion of the prosecution of non-disclosure. Reports from ‘Stop Prison Rape’ estimate that 300,000 inmates in North America are victims of sexual assault each year. Correctional Services and Statistics Canada do not collect data on sexual

²¹ *Correctional Service of Canada*, 2010, 12.

²² Polych, Carol. "Needle Exchange in Prison", (2012) <<http://canadianharmreduction.com/blog/needle-exchange-in-prisons>>.

²³ Ka Hon Chu, Sandra. "Making needle exchange programmes work in Canada – Part 3", (2015) <<http://blog.legalaid.on.ca/2015/02/19/making-prison-needle-exchange-programs-work-in-canada-part-3/>>.

²⁴ Werb et al., 2008.

²⁵ Thibault, Eric. "Federal inmate cost soars to \$117Gs each per year", *Edmonton Sun* (2014) <<http://www.edmontonsun.com/2014/03/18/federal-inmate-cost-soars-to-177gs-each-per-year>>.

²⁶ Ellenbogen, Philip. "Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada", (2009) <[http://www.columbia.edu/cu/jlsp/pdf/Spring2008/02Ellenbogen42.3\(revised\).pdf](http://www.columbia.edu/cu/jlsp/pdf/Spring2008/02Ellenbogen42.3(revised).pdf)>.

violence in prisons and so there is little data available to scrutinise purely Canadian statistics.²⁷ However, with rates of HIV being ten to thirty percent higher in prison compared to rates outside of prison²⁸ even a small prevalence of sexual violence in prison contributes to an exponential increase of transmission of HIV which, when prisoners are released unaware of the infection that they are bringing back to their communities causes the epidemic to continue. In contrast, advocates of prosecution argue the need of a deterrent to restrain people from intentionally spreading HIV.

THE FUTURE OF CANADIAN HIV/AIDS DISCLOSURE LAWS

Intentional cases are rare, most people as discussed in this paper are unaware of their status, and those who are regularly take preventative steps to protect against transmission; as such a focus on prosecution will not address the problem.

The true reason for criminalisation may be the societal expectation of accountability and punishment for the perceived social ‘wrong’ that the individual has committed, whether intentional or unintentional. However, as the saying goes, ‘it takes two to tango’, the responsibility cannot lie solely with the individual with HIV; the consenting sexual partner must be encouraged to have necessary discussion of HIV status if they are truly concerned about protecting themselves before sexual activity occurs. The prosecution of non-disclosure may provide a false sense of security to sexual partners²⁹ who may believe that the protection of non-disclosure will ensure the disclosure of a ‘positive’ status before engaging in sexual intercourse without the consideration that their partner may not be aware themselves.

²⁷ Alison, Robert. "Prison rape remains a tolerated terrorism", Winnipeg Free Press (2011)

<<http://www.winnipegfreepress.com/opinion/analysis/prison-rape-remains-a-tolerated-terrorism-122853709.html>>.

²⁸ Health Now, Prison. "Prison Health Now | About the Issue", (2013) <<http://www.prisonhealthnow.ca/learn-more/about-the-issue.php>>.

²⁹ Mesika, Robert. "The Ethics of HIV Criminalization", (2012)

<<https://www.brandeis.edu/ethics/ethicalinquiry/2012/July.html>>.

To end this epidemic, we need to encourage safe sex practices with free condoms and safe needle programmes such as Insite³⁰ both inside, and outside of prisons. We need to talk more openly about HIV/AIDS as a society to provide accurate education to children, to ensure they do not grow up in a stigmatised society like we have today. We need to re-educate society through the same source we learned to stigmatise; through the mass media who can make a huge impact with time.

We need to end this unfounded stigma and incorporate HIV tests into routine medical check-ups to alleviate this fear of HIV. Finally, we need to end the prosecution of non-disclosure and instead focus the time, resources and finances on these more appropriate and proven methods. If we do, it's possible that the UNAIDS goal of ending the HIV/AIDS epidemic by 2030 is not actually as far out of reach as we are led to think.

³⁰ *Coastal Health, Vancouver. "Insite - Supervised Injection Site" <<http://supervisedinjection.vch.ca/>>.*